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No. 84-1377

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

CABLE NEWS NETWORK, INC.,
Petitioner,

v.

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK and
THE JUDGES OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION

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Petitioner, Cable News Network, Inc. ("CNN"), seeks to extrapolate a First Amendment right to televise judicial proceedings from this Court's holding that the public and the press have a First Amendment right to attend criminal trials in person. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). The trial that CNN sought to televise—*Westmoreland v. CBS, Inc.*—was open to the public and the press and received extraordinary publicity throughout; indeed, half the courtroom was given over to the press. Nonetheless, CNN

claims that the First Amendment was violated because exclusion of television cameras pursuant to court rule [1] deprived the public of "the instantaneous access to reality that only live audio-visual coverage can provide." Pet. 12. For the reasons set forth below, there are no special or important reasons to grant certiorari, and the petition therefore should be denied.

The decision below, now reported at 752 F.2d 16, is clearly correct under the precedents of this Court. This Court first addressed electronic coverage of trials in *Estes v. Texas*, 381 U.S. 532 (1965), rejecting a claimed "right . . . to televise from the courtroom" as "a misconception of the rights of the press." *Id.* at 539. *See also Gannett Co. v. DePasquale*, 443 U.S. 368, 381 (1979) (*Estes* "reject[ed] the claim that the media representatives had a constitutional right to televise the trial"). Citing *Estes*, the Court held in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 610 (1978), that "there is no constitutional right to have [live witness] testimony recorded and broadcast." [2] The Term after *Richmond Newspapers* established the First Amendment right of the public and the press to attend trials in person, the Court held in *Chandler v. Florida*, 449 U.S. 560 (1981), that a state may *permit* telecasting of trials as a procedural experiment. First, however, the Court carefully reiterated "our holding in *Nixon v. Warner Communications, Inc.*" and emphasized that Florida's experiment with telecasts did not rest upon "any constitutional imperative." *Id.* at 569-70. *See also id.* at 589 (White, J.,

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[1] The court rule in question is General Rule 7 of the United States District Court for the Southern and Eastern Districts of New York. Most federal district courts have similar rules, *see* Pet. 4 n.2, and Canon 3A(7) of the Code of Judicial Conduct for United States Judges applies to all federal judges.

[2] *Warner Communications* assumed that "public understanding . . . remains incomplete" in the absence of electronic coverage. 435 U.S. at 610. Thus, the Court already has ruled specifically that there is no constitutional significance to the "instantaneous access to reality" trumpeted by CNN.

concurring in the judgment) (state may "forbi[d] cameras in its courtrooms in any criminal case"). With this clear guidance, the Second Circuit plainly would have erred had it accepted CNN's First Amendment claim.

The holding of the Second Circuit also is consistent with every other federal case to consider telecasting of trials and related questions. *See, e.g., United States v. Hastings*, 695 F.2d 1278, 1284 (11th Cir.), *cert. denied*, 103 S. Ct. 2094 (1983); *Combined Communications Corp. v. Finesilver*, 672 F.2d 818, 821 (10th Cir. 1982); *Dorfman v. Meiszner*, 430 F.2d 558, 562 (7th Cir. 1970); *United States v. Yonkers Board of Education*, 587 F. Supp. 51, 53 (S.D.N.Y.), *aff'd*, 747 F.2d 111 (2d Cir. 1984). CNN advances no claim of conflict.

The insubstantiality of the petition is underscored by its failure to come to grips with *Chandler*, a peculiarly relevant case postdating *Richmond Newspapers* but only mentioned in passing in the petition. Pet. 8, 10 n.13. In *Chandler*, the Court was obliged to give plenary consideration to the question whether a state could constitutionally permit telecasting of a trial, a question that would have been frivolous had *Richmond Newspapers* established a right to telecast. The Court in *Chandler* emphasized that electronic coverage of trials is an "experiment" in which "[d]angers lurk." 449 U.S. at 582. It is inconceivable that the potentially dangerous experiment considered in *Chandler* somehow has evolved into a constitutional requirement during the four short Terms since *Chandler*.

As noted in *Chandler*, the telecasting of trials has been the subject of sharp debate because of "the difficult and sensitive question of the potential psychological prejudice" to the judicial function of finding the truth in each case under the law and on the facts of record. 449 U.S. at 575. Less than a year ago, the Report of the Judicial Conference Ad Hoc Committee on Cameras in the Court-

room (Sept. 6, 1984) stated that seventy-eight percent of 600 active and senior federal judges and eighty-four percent of 636 members of the American College of Trial Lawyers oppose the telecasting of trials because of the perceived adverse influences on jurors, witnesses, lawyers, and judges, the diversion of judicial time into technological supervision, and the threat to the solemnity of judicial proceedings. Noting that the "primary function of a court is to administer justice in resolving disputes" and that "[i]ntroduction of cameras into the courtroom risks the transformation of judicial proceedings into media events and jeopardizes . . . the search for truth" (Report at 7, 9), the Ad Hoc Committee recommended denial of a media petition that would have required television access to federal courtrooms.

Little imagination is required to envision the effect of television at a trial such as that involving the Chicago Seven. *See United States v. Seale*, 461 F.2d 345 (7th Cir. 1972). CNN, of course, posits that *Westmoreland v. CBS, Inc.* presented a paradigm case for telecasting because of the consent of the parties and the willingness of the judge. But while repeatedly proclaiming the unobtrusiveness of television, the instant petition is suffused with evidence to the contrary. In the broadcaster's eyes, *Westmoreland v. CBS, Inc.* was less a judicial proceeding dedicated to detached truthfinding than a "test of 'the best and the brightest' in the crucible of trial examination" and "history in the making." Pet. 21. To the parties and witnesses, telecasting offered the prospect, not of enhancing truthfinding in a detached judicial setting, but rather of gratifying the desire "to reach the largest possible national audience in order to vindicate their respective versions of the truth." Pet. 22. Even the trial judge seemed affected by the eye of the camera, declaring that telecasting of the trial "is more important than its decision" because "historians and commentators on the war and on the press will not accept the verdict of the

jury and the rulings of the judge as definitive answers." Pet. App. 25. Without television, the judicial proceeding concluded with a settlement; had television provided a national soapbox, the trial might well have exceeded its natural life span even if jurors, witnesses, lawyers, and judge had resisted the temptation to "stray . . . from doing what 'comes naturally' into pluming themselves for a satisfactory television 'performance.'" *Estes v. Texas*, 381 U.S. at 591 (Harlan, J., concurring).

In summary, the decision of the Second Circuit is consistent with the decisions of this Court and of the other courts to consider this question. Thus, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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